

IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI O AOTEAROA

SC 90/2022  
[2023] NZSC 66

BETWEEN                      RAEWYN WALLACE  
   Applicant

AND                              ATTORNEY-GENERAL  
   First Respondent

   COMMISSIONER OF POLICE  
   Second Respondent

Court:                          Ellen France, Williams and Kós JJ

Counsel:                      G E Minchin and C J Tennet for Applicant  
   P J Gunn, B M McKenna and N I Dennis-McCarthy for  
   Respondents

Judgment:                      6 June 2023

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**JUDGMENT OF THE COURT**

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- A        The application for leave to appeal is dismissed.**
- B        There is no order as to costs.**
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**REASONS**

[1]        This application for leave relates to the Police shooting of Steven Wallace in 2000. It is brought by his mother, Raewyn Wallace who, in 2014, filed a civil claim alleging that State actors breached Steven’s right to life as protected in s 8 of the New Zealand Bill of Rights Act 1990. Ms Wallace succeeded to a limited extent in the

High Court.<sup>1</sup> She appealed in relation to the unsuccessful aspects and the Crown cross-appealed. The Court of Appeal found for the Crown in both appeals.<sup>2</sup>

### **Factual and procedural context**

[2] In the small hours of 30 April 2000, Steven Wallace went on a rampage in the town of Waitara, smashing the windows of the local Police station, stores and cars (including an occupied Police car) with a baseball bat and a set of golf clubs. He was eventually confronted by Constables Abbott and Dombroski who, by that stage, were armed.<sup>3</sup> According to Constable Abbott's evidence, Steven advanced on him. Constable Abbott fired a warning shot into the air and told Steven to stop, or he would shoot him. When Steven continued to advance, Constable Abbott shot Steven four times from a distance of four to five metres. All four shots struck him and one of them penetrated his liver, mortally wounding him. Steven died at Taranaki Base Hospital a few hours later.

### *Investigations and prosecution*

[3] An internal Police investigation recommended against prosecuting Constable Abbott. The Solicitor-General separately considered the matter and affirmed the decision. The Police Complaints Authority commenced an investigation and obtained a report by a senior Police officer.<sup>4</sup> Due to the supervening commencement of a coronial inquest, the Authority did not complete its investigation or issue a report.

[4] The coronial inquest was also adjourned when Steven's father indicated he intended to commence a private prosecution against Constable Abbott for murder. Mr Wallace filed an indictment to that effect in 2001. A depositions hearing was held before Justices of the Peace and the parties agreed there was sufficient evidence to commit Constable Abbott for trial. Despite this, the JPs adjudged Constable Abbott to have acted in self-defence and discharged him.

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<sup>1</sup> *Wallace v The Attorney-General* [2021] NZHC 1963 (Ellis J) [HC judgment].

<sup>2</sup> *Wallace v Attorney-General* [2022] NZCA 375, [2022] 3 NZLR 398 (Miller, Gilbert and Goddard JJ) [CA judgment].

<sup>3</sup> Constable Abbott has since retired from the Police force and Constable Dombroski is now Sergeant Dombroski.

<sup>4</sup> Now the Independent Police Conduct Authority.

[5] In response, James Wallace filed an application in the High Court seeking its consent to the filing of the indictment.<sup>5</sup> Elias CJ granted the application.<sup>6</sup> James Wallace then invited the Crown to take charge of the prosecution or fund his conduct of it. The Solicitor-General declined to take up either invitation.

#### *Trial of Constable Abbott*

[6] At trial, Constable Abbott's defence was justification. Section 48(1) of the Crimes Act 1961 provides that self-defence is a justification provided the defendant used only "such force as, in the circumstances as he or she believes them to be, it is reasonable to use". The prosecution accepted that Constable Abbott was acting in self-defence. The only issue was whether the lethal force he used was reasonable in the circumstances as he subjectively perceived them. The jury found Constable Abbott not guilty of culpable homicide.

#### *Further investigations*

[7] Following the acquittal, the Coroner resumed his inquest into Steven's death. The Coroner did not re-examine the evidence going to self-defence. He found that the relevant Police policies and procedures were generally fit for purpose but criticised some aspects of their application.

[8] In 2008 the Independent Police Conduct Authority undertook its own investigation. The IPCA did not revisit self-defence either. It made no findings of any real materiality critical of Police conduct before or after the shooting.

#### **The civil claim**

[9] In 2014 Ms Wallace commenced civil proceedings against the Crown, alleging breach of s 8. Declarations were sought together with compensation. Other causes of action challenged the efficacy of subsequent investigations and the lawfulness of Solicitor-General's refusal to take control of the prosecution.

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<sup>5</sup> Crimes Act 1961, s 345(3).

<sup>6</sup> *Wallace v Abbott* (2002) 19 CRNZ 585 (HC).

[10] It was common ground that self-defence could be revisited in civil proceedings despite Constable Abbott's acquittal. The parties also agreed that the evidential record of depositions and trial, together with all investigatory reports would be admitted subject only to any specific points of objection. However, during the hearing the claim developed into a direct challenge to this evidential record. Constable Abbott was not called to give an account of his actions.

### **High Court decision**

[11] Ellis J rejected the factual challenges as unsupported by the evidence and adopted the following approach to assessing justification. First, self-defence in a civil context involves an additional objective requirement in that Constable Abbott's understanding of the relevant circumstances had to be both honestly held and reasonable.<sup>7</sup> Secondly, in proceedings founded on s 8 of the Bill of Rights, the onus in relation to justification is reversed. The defendant must make out self-defence on the balance of probabilities.<sup>8</sup>

[12] Applying the s 48 test and that framework, Ellis J found that Constable Abbott had acted in self-defence throughout and that the force he used was reasonable in the circumstances as he (reasonably) perceived them to be.

[13] The Judge accepted that s 8 implies a State obligation to investigate the taking of life in its name. Such investigation must be independent, effective, prompt, transparent and involve the deceased's next of kin. The Judge found that there had not been a s 8-compliant investigation into Steven's death. Constable Abbott's trial, having been prosecuted privately, could not satisfy the State's obligation and subsequent investigations had refused to revisit self-defence. The Judge also found that the Solicitor-General impermissibly failed to give adequate reasons for the refusal to take over the private prosecution following the judgment of Elias CJ. Declarations in respect of those two matters were made but no damages were awarded. The claim was otherwise dismissed.

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<sup>7</sup> HC judgment, above n 1, at [299]–[306].

<sup>8</sup> At [307]–[311].

[14] Ms Wallace appealed to the Court of Appeal. The Crown cross-appealed.

### **Court of Appeal decision**

[15] The Court of Appeal rejected the High Court finding that Constable Abbott's belief (about the circumstances in which he fired the shots) had itself to be reasonable. The Court emphasised that if the test in s 48 is met, then s 2 of the Crimes Act provides the relevant act is justified for the purposes of civil as well as criminal proceedings.<sup>9</sup> It found that this was conclusive.

[16] As to the burden of excluding or proving justification under s 8, the Court of Appeal preferred the Canadian approach in Charter litigation where the burden consistently rests on the person asserting breach of the relevant Charter right.<sup>10</sup> The Court of Appeal considered this would not result in unfair prejudice since the civil standard of proof is lower, the State must give the plaintiff discovery and the court is able to take a robust, flexible approach to evidential burdens and inferences. The Court of Appeal noted that applying a reverse onus can also create difficulties with classifying who must prove certain facts.

[17] The Court of Appeal accepted that s 8 imposes on the State an obligation to investigate any potentially unlawful death at the hands of State actors<sup>11</sup> in a manner that is independent, impartial, prompt, thorough, effective, credible, and transparent.<sup>12</sup> But the Court disagreed with the High Court's view that a private prosecution is inherently incapable of discharging the State obligation. While the State did not initiate the prosecution, it rested almost entirely on infrastructure provided by the State.<sup>13</sup> The Court held that the criminal trial, Coroners' inquest and IPCA investigation combined adequately met the s 8 obligation to investigate.<sup>14</sup>

[18] Like the High Court, the Court of Appeal expressed concerns about the limitations of the evidential record as a foundation for the factual findings Ms Wallace

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<sup>9</sup> See CA judgment, above n 2, at [101].

<sup>10</sup> At [103].

<sup>11</sup> At [132].

<sup>12</sup> At [118].

<sup>13</sup> At [139].

<sup>14</sup> At [148].

now sought. In any event, the Court agreed with Ellis J that the best evidence of the circumstances as Constable Abbott perceived them to be was his own evidence at trial. Constable Abbott had said he feared for his life. While rejecting Ellis J's reasonableness overlay, the Court agreed that such belief was nevertheless reasonable. Other challenges to the finding that Constable Abbott's use of lethal force was justified, as well as challenges in relation to prosecution error and the planning and control of the operation, also failed.

[19] Finally, Ms Wallace's pleading did not challenge the adequacy of the Solicitor-General's reasons. The Court of Appeal held that the issue was not properly before the High Court and it was not open to the Judge to reach any findings on it.<sup>15</sup>

### **Submissions**

[20] The applicant's 13 proposed grounds of appeal challenge the Court of Appeal's findings of law and fact. In broad terms the grounds seek to establish that the Court of Appeal was wrong in:

- (a) finding that self-defence in a civil claim did not include an objective mental element;
- (b) finding that there is no reverse onus in s 8 claims;
- (c) finding that a private prosecution can satisfy the State's obligation to investigate a death caused by State actors, and in any event was wrong to find that this private prosecution, in combination with the several other investigations, cumulatively met the obligation;
- (d) making findings of fact that effectively ignored the evidence-based narrative advanced by Ms Wallace;
- (e) finding that the quality of first aid administered to Steven at the scene was irrelevant;

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<sup>15</sup> At [198].

- (f) finding that there was no evidence to support prosecutor error due to insufficient funding; and
- (g) finding that the Crown was caught by surprise in relation to the ground that the Solicitor-General's refusal to take over the prosecution lacked reasons and was therefore unlawful.

[21] The respondents acknowledge that three (but only three) of the applicant's grounds raise important issues of principle. They are the additional objective element in self-defence, the reverse onus under s 8 and whether a private prosecution can ever satisfy the s 8 investigation obligation. The Crown says however that this case is unsuitable as a vehicle for ventilating these issues and leave to appeal should be declined.

### **Discussion**

[22] We agree that only these three appeal grounds raise questions of general importance.<sup>16</sup> Most of the other proposed grounds are case and fact specific, and they are unsuitable for consideration on a second appeal due to the constrained evidential and procedural basis upon which the case has proceeded.

[23] Ms Wallace's argument that the prosecution was under-resourced causing counsel to wrongly adopt an overly narrow approach has insufficient prospects of success to warrant the grant of leave.<sup>17</sup> We are not satisfied that there is a proper evidential basis upon which the required inferences might be considered arguable.

[24] As to the Solicitor-General's failure to provide reasons for refusing to take over the prosecution, the Court of Appeal's decision related to a straightforward matter of procedure which arose in the distinctive procedural history of this case. No question of public importance is involved and we are not satisfied that there is any risk of miscarriage if leave is not granted on this ground.

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<sup>16</sup> Senior Courts Act 2016, s 74(2)(a).

<sup>17</sup> *Prime Commercial Ltd v Wool Board Disestablishment Company Ltd* [2007] NZSC 9, (2007) 18 PRNZ 424 at [2]; *B (SC 18/2020) v R* [2020] NZSC 52 at [12]; and *Foster v R* [2021] NZSC 130 at [4].

[25] As to the three grounds that do raise matters of general importance, we are not satisfied that this is an appropriate case in which to address them. First, even if contrary to the Court of Appeal's view, self-defence does have an additional objective standard, there are concurrent findings of fact that this standard was met anyway, so the appeal is unlikely to turn on this issue.<sup>18</sup> Second, the position with respect to the reverse onus is similar. While preferring the orthodox approach to onus, the Court of Appeal nonetheless found the evidence positively established that Constable Abbott used reasonable force. These consistent factual findings mean where the onus of proof lay is unlikely to have made a difference to the outcome.

[26] Finally, we agree the State's obligation to investigate Steven's death is an important matter, but we are not satisfied that the challenge to the Court of Appeal's conclusions has sufficient merit to warrant the grant of leave.

### **Conclusion**

[27] The application for leave to appeal is dismissed. There is no order as to costs.

Solicitors:  
Exeo Legal, Wellington for Applicant  
Crown Law Office, Wellington for Respondents

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<sup>18</sup> *Perkins v Porea* [2010] NZSC 15, (2010) 10 NZCPR 876 at [6].